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CHARLES ELMORE CROPLEY
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No. 848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

BEULAH EATON McALLISTER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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Opinions Below.

The majority (R. 37-40) and dissenting (R. 40-43) opinions in The Tax Court of the United States are reported at 5 T. C. 714. The majority (R. 73-77) and dissenting (R. 77-82) opinions in the United States Circuit Court of Appeals for the Second Circuit are reported at 157 F. 2d 235.

Jurisdiction.

Judgment of the Circuit Court of Appeals was entered August 6, 1946 (R. 82). Petitioner's time to file its petition herein was extended for sixty days from November 6, 1946 and the petition was filed on January 3, 1947.

Jurisdiction of this Court is invoked by petitioner under Section 240(a) of the Judicial Code, as amended. February 13, 1925 (28 U. S. C. A. 347 (a)).

Statement.

Amplifying petitioner's statement of the case from his summary of the facts found by The Tax Court, respondent submits that Judge Disney, who alone sat at the hearing for that Court, in his dissenting opinion (R. 40 and 41), concisely set forth and clarified the facts by first pointing out the life estate here sold was received by devise, was held alienable by the local court, and had a basis for value at acquisition under Section 113 (a) (5), and then stating we have in this case a sale of alienable property with a base provided by statute, which life interest so transferred is to be valued through expectancy tables as prescribed by the Treasury Department (I. T. 2076, C. B. III, p. 18).

Question Presented.

Does the $55,000.00 received by petitioner from the remainderman for her life interest in a trust constitute a receipt from the sale of a capital asset or gross income?

Arguments Against Granting the Writ.

POINT I.

The question has already been settled by this Court.

The Acting Solicitor General advances as his first reason for granting a writ of certiorari that it is a matter of substantial public importance that the issue be reviewed by this Court, because of alleged tax avoidance possibilities by private agreement if the decision below is followed. However, we do not understand it is, as yet, illegal to dispose of one's property by private agreement, even though by doing so at a loss results in a tax deduction.

It is submitted that the question here presented has already been settled by the decision of this Court in *Blair* v. *Commissioner*, 300 U. S. 5. In the *Blair* case, the life beneficiary of a trust assigned to his children specified sums to be paid each year for the duration of the estate. This Court held each transfer was the assignment of a property right in the trust and that, since the tax liability attached to ownership of the property, the assignee, and not the assignor, was liable for income taxes in the years in question. As was argued in the Court below and stated by Circuit Judge Clark in the majority opinion there, the reasoning and conclusion of the *Blair* case support respondent's position and settle the law on the question here presented. Furthermore, all of the Circuit Courts before which this question has been argued, including the Second, Fifth, Seventh and Eighth Circuits, being the case below, 157 F. 2d 235, 236, *Allen* v. *First National Bank & Trust Co. in Macon*, 157 F. 2d 592, *Quigley* v. *Commissioner*, 143 F. 2d 27, and *Bell's Estate* v. *Commissioner*, 137 F. 2d 454, 458 respectively, have decided the question against the Government, and excepting the Seventh Circuit, cited the *Blair* case as their principal authority.

POINT II.

The decision below is not in conflict with any applicable decisions of this Court.

The second reason advanced for granting a writ is that the decision below is in conflict in principle with *Hort* v. *Commissioner*, 313 U. S. 28 and *Irwin* v. *Gavit*, 268 U. S. 161, the only allegedly applicable decisions so mentioned by petitioner.

In the *Hort* case, a landlord for a consideration cancelled a lease for a term of years, there being about nine years yet to run. The consideration received was held a substitute for the rent as it fell due and, as the statute expressly taxed income derived from rent, it was taxed as income. However, the landlord retained the ownership of his leased property which he was free to lease again; there was no transfer of any kind and the capital asset which was the property producing the income remained in his possession. In the *Blair* case and the case below, the life tenant was entitled to enforce the trust, to enjoin a breach of trust, and to obtain redress in case of breach. Then upon disposing of her entire life interest, which included all her interest in the property producing the income, for $55,000.00, Mrs. McAllister had nothing left such as did the *Hort* case landlord. It is submitted, therefore, that the decision below is not in conflict with the *Hort* case, involving as it did, the extinguishment of a contractual right to future rents and not an assignment of an interest in property. For the same reason, neither is the *Blair* case in conflict with the *Hort* case.

Again, in the *Gavit* case Justice Holmes, at page 166, clearly indicated that what was taxable was income, and not the property from which the income is derived. That case dealt only with the question of whether income paid to the beneficiary of a trust was taxable to the beneficiary as income and not exempt, as property acquired by bequest. The decision below does not conflict with the *Gavit* case because it is not even on the same point.

POINT III.

The Court below did not misapply the *Blair* v. *Commissioner* decision.

The third reason advanced for granting a writ is in fact the converse of the second reason, for in following *Blair* v. *Commissioner,* 300 U. S. 5, *supra,* the Circuit Courts referred to in our Point I refused to follow and find applicable the cases of *Hort* v. *Commissioner* and *Irwin* v. *Gavit* (both *supra*) with which petitioner claims the decision below is in conflict.

The *Blair* decision dealt with assignment of income by a life beneficiary. There the Court held that since one entitled to net income of a trust for life is owner of an equitable interest in the corpus of the trust property, alienable like any other property in the absence of a valid restraint upon alienation, and such a beneficiary may transfer a part of his interest as well as the whole, then the life beneficiary is not taxable on the assigned income, it being not the assignment of a chose in action but of the right, title, and estate in and to property.

The legal principles necessarily enunciated in the *Blair* case are directly applicable to the instant case. The fact that the *Blair* assignment of a life interest in a trust was gratuitous and the instant disposition of a life interest was for a consideration does not alter the legal conclusions there reached. Furthermore, the Government would have acquired additional taxes if a capital gain had resulted in our case, so even the fear of large tax payments avoided, if that prompted the decision by the majority of The Tax Court, is groundless.

Congress has not seen fit to delimit the term "property" as used in Section 117 (a) of the Internal Revenue Code (Appendix to Petition, 16) so as to exclude trust income in any particular form, although the Government argues at page 13 of its brief that such exclusion was intended. Hence the relief provisions of Section 117 are clearly applicable here.

Conclusion.

For the foregoing reasons, the Government's petition for a writ of certiorari should be denied.

Respectfully submitted,

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February, 1947.

Appendix.

Treasury Department Regulation:

I. T. 2076, C. B. III, p. 18:

"The value of B's life estate for the purpose of computing gain or loss from its sale shall be ascertained by the following tests:

"(1) An annuity based upon income at the rate of 4% per annum of the value of the fee on the date of his acquisition of the life estate in 19..... should be computed. For this purpose Table A, appearing on Page 18 of Regulations 63, revised, should be used to determine the then worth of $1.00 payable at the end of each year during the life of the taxpayer which multiplied by the amount which is shown to be the annual income based upon a 4% return as hereinbefore stated will give the value of the taxpayer's life estate at the date of acquisition.

"(2) Relates to 1913 value—not applicable in the present taxpayer's case.

"The difference between the value arrived at by using method (1) and the selling price should be used as the basis for determining the gain from the sale of B's life estate * * *."